

University of Great Falls and Montana Federation of Teachers, AFT, AFL-CIO, Petitioner. Case 19-RC-13114

November 8, 1997

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On February 20, 1996, the Regional Director for Region 19 issued a Decision and Direction of Election in which he concluded that asserting jurisdiction over the Employer was warranted under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); that asserting jurisdiction would not violate the Religious Freedom Restoration Act (RFRA);¹ and that the University's faculty members were not managerial employees as defined in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Decision and Direction of Election. By Order dated April 2, 1996, the Board denied review of the Regional Director's conclusion that asserting jurisdiction was warranted under *Catholic Bishop* but granted review with respect to the managerial status of the faculty.²

Having carefully considered the entire matter, including the briefs on review,³ the Board, for the reasons set forth in the Regional Director's Decision (relevant portions of which are attached as an appendix) has decided to affirm the Regional Director's conclusion that the faculty members are not managerial employees as defined in *Yeshiva* and instead are employees subject to the Act. In affirming the Regional Director, the Board notes that the facts in the instant case are similar to those in *Florida Memorial College*,⁴ and *St. Thomas University*,⁵ in which the Board found that the faculty members were not managerial employees. In *Florida Memorial College*, the curriculum was not within the faculty's absolute control, and all curricular

proposals had to be approved by the administration. In addition, faculty members had no effective control over admissions policy, graduation requirements, or matters relating to the retention, suspension, probation, or expulsion of students.

In *St. Thomas*, faculty members did not have absolute control over the curriculum, as all curricular recommendations and every proposal regarding academic policy needed to be approved by the division chairs. Division chairs certified students for graduation, consulted with faculty on syllabus preparation and selection of textbooks, and reviewed proposed class schedules. Further, the administration unilaterally established a law school; eliminated entire degree programs; proposed, drafted, and adopted the vast majority of academic policy and curriculum changes; and played the predominant role in determining curriculum, grading methods, faculty hiring, and tenure. The Board found that the evidence in *St. Thomas*, similar to the evidence here, did not establish that the faculty, through committees, had effectively recommended or had been the moving force behind the formulation and adoption of policies, and concluded that the faculty members did not exercise managerial authority as set forth in *Yeshiva*.⁶

Further, *Elmira College*,⁷ relied on by the Employer, is distinguishable. There, excluded division chairs suggested class schedules, set the number of sections which a faculty member could teach, made recommendations regarding salaries to the administration, and planned the academic calendar. Unlike here, however, it was the faculty members who had final authority for establishing standards for developing and approving new courses, approving changes in course levels and changes in majors and minors, adding courses, setting credit hours, course content, size of classes, curriculum, grading of students, degree requirements, admission and graduation standards, major and minor requirements, and approving applications for waiving academic requirements. Further, unlike here, there was clear evidence that faculty recommendations were generally followed.⁸

¹ 42 U.S.C. § 2000(bb).

² The Board also granted review with respect to whether asserting jurisdiction violated the Religious Freedom Restoration Act. Subsequently, however, in *City of Boerne v. Flores*, 117 S.Ct. 2157 (June 25, 1997), the Supreme Court concluded that RFRA was unconstitutional as it contradicted principles necessary to maintain the separation of powers and exceeded Congress' enforcement powers granted to it by Section Five of the Fourteenth Amendment. Consequently, we find that the issue of whether the Board's assertion of jurisdiction over the Employer violates RFRA is moot.

³ The Association of Southern Baptist Colleges and Universities filed an amicus curiae brief in support of the Employer, and Loma Linda University, Loma Linda University Medical Center, Pacific Union Conference of Seventh-Day Adventists, and Adventist health also filed an amicus curiae brief on behalf of the Employer.

⁴ 263 NLRB 1248 (1982).

⁵ 298 NLRB 280 (1990).

⁶ See also *Loretto Heights College*, 264 NLRB 1107 (1982), *enfd.* 742 F.2d 1245 (10th Cir. 1984).

⁷ 309 NLRB 842 (1992).

⁸ Although not relied upon by the Employer, we also find *Lewis & Clark College*, 300 NLRB 155 (1990), to be distinguishable. There, the Board found that faculty effectively controlled academic matters, as nearly all its recommendations were routinely approved, and some academic matters were approved without making recommendations to higher management. Faculty made academic decisions or effective recommendations in the following academic areas: teaching methods, grades, retention standards, scholastic standards, matriculation standards, admission standards, curriculum and course content, degree and degree requirement, teaching assignments, graduation requirements, academic calendars, departments of instruction, honors programs, scholarship, and financial aid. For example, the faculty approved a new core curriculum, approved new minors, and

Continued

Accordingly, the Regional Director's finding that the petitioned-for faculty members are not managerial, as defined in *NLRB v. Yeshiva University*, is affirmed and the case remanded to the Regional Director for further appropriate action consistent with this decision.⁹

conversion of the music school to a department, and changed foreign language, math, and writing policy requirements.

⁹While the above case was pending before the Board, the Employer filed a motion to reopen the record with respect to the Board's decision to assert jurisdiction under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The Petitioner filed a response. We deny the Employer's motion to reopen, as the evidence the Employer seeks to add to the record would not warrant a different result in this case.

APPENDIX

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board (the Board).

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me.

Upon the entire record in this proceeding,¹ I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time faculty including professors, associate professors, assistant professors, instructors and associate faculty and all part-time associate faculty employed by University of Great Falls in Great Falls, Montana, but excluding part-time adjunct faculty, deans, nonprofessional employees, guards and supervisors as defined in the Act.

The University of Great Falls (UGF) is a liberal arts university in Great Falls, Montana, which awards both bachelor's and master's degrees. A college founded in 1932 by the religious order of the Sisters of Providence, St. Ignatius Province (the Order), the institution attained university status in 1995. It is an open admissions institution.

As amended at the hearing, the Petitioner seeks a unit of all full-time faculty including professors, associate professors, assistant professors, instructors and associate faculty, and all part-time associate faculty, but excluding part-time

¹The parties' briefs were considered.

adjunct faculty, deans, nonprofessional employees, guards, and supervisors as defined in the Act.

The parties stipulated the exclusion of adjunct faculty on the grounds they share no community of interest with the faculty sought. The parties also stipulated the inclusion of part-time associate faculty on the grounds they share a community of interest with full-time faculty. The parties stipulated the provost/academic vice president and president are managerial employees who should be excluded from the unit. B. Lee Cooper is the provost/academic vice president and Frederick Gilliard is the UGF president.

Managerial Status of Faculty

Deans

Reporting to the president are the provost/vice president of academic affairs (provost), the vice president for development, the vice president for finance and the vice president for student services. The registrar reports to the provost.

Deans perform administrative functions related to the operation of the academic schools or colleges. They are full-time members of the faculty, with full faculty rights and privileges. All but one dean teach.¹² Deans report to the provost/vice president of academic affairs (provost). The only other faculty who report directly to the provost are the program directors and the computer laboratory manager.¹³

Deans are appointed by and serve at the pleasure of the provost. The faculty handbook requires that the provost obtain a consultative written vote from the full-time faculty when selecting a dean and specifies that appointment normally should be in conformity with the faculty's judgments. Whether this in fact has been the case was not given. There is no predetermined term of office. It appears that the assignment as dean tends to be fairly long term. For example, Dean Deborah Kottel has served as dean (a position formerly entitled "division head") for 9 years.¹⁴ Should a dean be removed from that position, the individual continues employment as a teaching faculty member. Four of the deans are tenured; the others are tenure-track faculty. Deans are treated as are other faculty as far as consideration for promotion and tenure.

Seven of the deans are on 9-month contracts, as are nondean faculty. One dean has a 12-month contract. Deans teaching full loads receive a stipend in addition to their faculty salary. The average stipend is 9.15 percent of their contract salary, and can be as much as 17.2 percent of salary. The college and graduate school deans and the dean of outreach studies receive summer stipends of \$5000. Undergraduate school deans receive stipends of \$2520.

Deans oversee the college and/or schools for which they are responsible. Deans and program directors are the only faculty whose performance is evaluated by the provost. Program directors are evaluated by the provost only with respect

¹²The dean of outreach studies is not teaching this year but will teach next year. Five deans teach full loads and two teach a three-quarters load.

¹³Hereafter, the term "program director" shall be used to encompass the computer laboratory manager as well as those whose title is program director.

¹⁴Since the conversion to university status, the positions held by Kottel are those of dean of the college of professional studies and dean of the school of human services.

to their duties as directors. With respect to their duties as teaching faculty, they are evaluated by their deans. Deans, on the other hand, are evaluated solely by the provost.

Deans perform annual written performance evaluations for the faculty of their schools or colleges. These are in part based upon deans' classroom observation of faculty teaching and upon student evaluations which deans review. Deans meet with faculty members to discuss the evaluations. These evaluations become part of faculty members' personnel records and are used in making promotion and tenure decisions. Deans make recommendations regarding tenure to the faculty status committee, and regarding faculty promotions to the promotions committee. The latter is composed of the members of the faculty status committee plus the dean of the faculty member being evaluated.

Independently, deans may and do discipline faculty, both orally and in writing. Written reprimands are retained in faculty members' personnel files. Oral reprimands may be memorialized in writing and similarly retained. Kottel recommended the termination of three faculty members; all three recommendations were acted upon without independent investigation by higher management. In two instances, she advised professors to seek counseling, and her advice was followed.¹⁵

Deans are significantly involved in course scheduling. Faculty submit course schedules to their deans. These are reviewed by deans to ensure there are sufficient course offerings. Deans may determine that additional classes should be taught and arrange for full-time faculty or adjunct faculty to teach them. Deans also may and do require faculty to change their class times in order to avoid conflicts and ensure proper scheduling overall. Once the course schedule is printed, changes may be made only upon authorization of the dean. Deans independently determine whether to cancel classes based on enrollment, even over the objection of the faculty member offering the course.

With the input of their faculty, deans draw up budget proposals for their schools for submission to the provost. Deans control and administer their schools' budgets. Deans are accountable for their performance in handling their budgets and are specifically evaluated on this responsibility.

Deans authorize expenditures for school needs, including part-time faculty and overload staffing expenditures. All purchase orders must be approved by deans. Deans determine whether to allow open accounts at the UGF bookstore for faculty purchases. Deans must approve faculty travel. While the vice president for finance also signs off on faculty travel requests, his approval is a pro forma adoption of the dean's approval. Work orders for work of any kind, even such minor tasks as changing light bulbs, must be signed by the dean and approved by the vice president of finance.

Deans determine whether adjunct faculty will be retained to teach classes. Their decisions as to whether certain classes should be taught by adjunct faculty, or offered at all, is influenced by their responsibility for administering their budgets. Deans recommend the hiring and retention of specific adjunct faculty, and in virtually all cases, the deans' recommendations are accepted routinely by the provost.

The UGF bookstore will not take a professor's order for class textbooks unless the dean has approved the request.

Kottel testified that while she generally accepts faculty members' book order requests, there have been several occasions when she has not permitted the requested books be ordered.

Student applications for individualized study must be approved by the dean. Deans must approve home study courses and special student projects, summer session courses, and student course challenges and waivers of courses. While nondean faculty, either as a whole or in committee, do not pass on applicants for graduation, students must be approved for graduation by deans.

Formal student grievances regarding faculty must be presented to the school dean prior to submission to the grievance committee. Deans have authority to resolve student grievances. Kottel testified that 50 percent of formal student grievances are resolved at her level. Deans must file a report with the vice president of student affairs detailing their action and position on grievances; these reports become part of the grievance record. Deans also hear and adjust student complaints regarding faculty which are not brought as formal grievances. In resolving student grievances or informal complaints, deans independently may direct involved faculty members to change their classroom conduct, their manner of interacting with students, or their style of commenting on students' work. It appears faculty comply with such directives.

The deans of the undergraduate colleges orient new faculty in day-long sessions which cover all aspects of faculty duties and responsibilities. Kottel prepared the orientation handbook which is given all faculty.

While deans are required to give recommendations on faculty promotions and tenure requests, it is unclear to what extent their recommendations are effective. In all cases where the dean does not recommend promotion or tenure of an eligible faculty member, the provost must consult with the dean and the faculty member.

Monthly, all deans convene in a group called the council of deans. Deans there discuss a variety of topics, including policy matters and broad faculty-related issues. It is unclear whether deans formulate, recommend, or determine the means to effectuate institutional policy through their discussions at these meetings.

Program Directors

Program directors have responsibility in particular program activities and are expected to ensure the tasks of their programs are carried out. Cooper testified generally and without further explication that their responsibilities are comparable to those of deans, albeit within a narrower programming scope. Exactly what their duties and responsibilities entail was not described.

Six of the program directors are not deans. These are the director of the English writing program; the two codirectors of the criminal justice program; the director of master in professional counseling program; the director of wellness and intramural programs; and the computer laboratory manager. A new director position has been established, that of director of the University research center, and will be filled by a nondean faculty member. Assignment as a program director is a continuing assignment.

Program directors report to the provost vis-a-vis their programs. Four of the nondean program directors have faculty reporting to them. While an Employer witness generally as-

¹⁵ One of these two instances involved an adjunct professor.

serted that these directors have authority to discipline reporting faculty comparable to deans' disciplinary authority, no example was provided in which a nondean program director independently disciplined a faculty member or effectively recommended such action. Faculty who report to nondean directors are not evaluated by the directors but rather by their dean.

Program directors carry full teaching loads and are evaluated with respect to their teaching duties by their deans. All but four of the program directors receive stipends of \$2520 or \$2700; the other four receive \$1260 or \$1680.

Faculty Authority and Responsibilities

Faculty participate in academic governance through facultywide votes on certain matters and through membership on various committees. Faculty committee members have one vote each. Inasmuch as deans and program directors are faculty with full faculty rights, they may vote for faculty representatives to those committees on which faculty are selected through a faculty vote. Inasmuch as they are faculty, deans and program directors may hold faculty positions on committees either by faculty election or by administrative appointment.

There are four standing campus committees: faculty status, curriculum and academic affairs, admissions, scholarships and financial aid; and student rights and responsibilities. The president is an ex officio member of all committees except the faculty status committee. The faculty handbook¹⁶ specifies that the creation or dissolution of standing committees involving faculty requires a two-thirds vote of the faculty. In addition to standing committees, there are several ongoing ad hoc committees.

Faculty Status Committee

The faculty status committee is a seven-member committee composed entirely of faculty. It convenes once monthly and at other times as needed. Committee members are elected by the faculty for 3-year terms. Currently, the faculty status committee includes three deans. The present committee chair is not a dean.

This committee acts in an advisory capacity to the provost on such matters as faculty leaves and sabbaticals, faculty promotions and tenure actions, and faculty terminations. It recommends to the provost regarding general and specific faculty policies. Annually, the committee selects one of its members to serve as the committee's representative on the campus budget committee.¹⁷ The bylaws specify the committee is to counsel with the vice president for student services on matters and policies pertaining to faculty-student relations. The committee hears and assists in resolving faculty grievances relating to promotion, tenure, and retention.¹⁸

¹⁶The faculty handbook is the fundamental policy guide for faculty and is made part of faculty contracts.

¹⁷This year, the faculty status committee representative on the budget committee is a dean.

¹⁸Faculty grievances in other areas are heard by individual grievance committees specially convened for specific grievances. Such committees are composed of the vice president for student services as chair, and four additional members appointed by the president, only one of whom is a faculty member.

According to the faculty handbook, dismissal of nonadjunct faculty is preceded by "informed inquiry" by the faculty status committee which may, failing to effect an adjustment, determine whether in its opinion dismissal proceedings should be undertaken, without its opinion being binding upon the president. No evidence was presented as to whether the committee has in fact rendered such opinions and, if so, whether those opinions have been followed. The bylaws of the faculty status committee specify that the committee is to advise the academic vice president on all contemplated employment terminations. Provost Cooper, who came to UGF in September 1993, has terminated two nontenured nonadjunct faculty. In neither case did he notify and consult with the faculty status committee. No tenured faculty member has been terminated since Cooper's arrival.

Recommendations of the faculty status committee are made in writing to the provost. In turn, the provost makes recommendations to the president, who recommends to the board of trustees. The board of trustees has ultimate decision-making authority in matters recommended by this committee. Cooper testified without contradiction that all recommendations of the faculty status committee with respect to leaves and sabbaticals have been granted. Faculty submit requests for sabbaticals to their dean, who recommends action to the faculty status committee. The dean is responsible for ensuring the requesting faculty member can be replaced. Kottel testified that without the dean's approval, a sabbatical request would not be granted. Sabbaticals granted may not exceed the amount budgeted for this purpose by the board of trustees.

Since Cooper's arrival at UGF, there have been four faculty promotions. In three of these cases, the committee's recommendations were implemented. In the fourth instance, the faculty status committee felt the applicant did not have sufficient graduate credits to qualify for the promotion and recommended the promotion be denied. Based on his own review of the committee's rationale and the applicant's credentials, Cooper disagreed with the committee's assessment and communicated his concerns to the committee. The committee adhered to its recommendation. Cooper then advised the president to grant the promotion despite the committee's recommendation. The president agreed with Cooper. Cooper's and the president's recommendations to promote the individual went to the board of trustees, along with the committee's recommendation that promotion be denied. The promotion was granted.

There have been five grants of tenure since Cooper's arrival at UGF. In one of these instances, the faculty status committee recommended a delay in granting tenure. Cooper disagreed with the recommendation based on his own review of the committee's rationale; the faculty member's credentials, abilities, and contributions; and the credentials, abilities and contributions of others to whom tenure had been granted. The president and board of trustees were informed of the conflicting recommendations and implemented Cooper's recommendation that tenure be granted.

The faculty status committee may and does establish various subcommittees to address specific issues or projects. For example, prior to the recent conversion to university status, an all-faculty subcommittee of the faculty status committee worked on the governance process for academic operations. The effectiveness of its recommendations in this area was

not described. There is a governance subcommittee which has been working on proposals to restructure the system of faculty committees. The subcommittee's proposal has been approved by the faculty status committee and will go to a full faculty vote in the spring of 1996. The proposal includes the creation of an executive committee, despite Cooper's suggestion that there be no such committee in the new paradigm. Even should this proposal pass the full faculty, it must be approved by the administration. Another subcommittee has worked on rewriting the faculty handbook. The chair of the faculty status committee has chosen to table that project until other issues have been settled.

Final proposals of subcommittees are submitted to the faculty status committee for approval. Certain matters approved by the faculty status committee are passed to the full faculty for vote, as would be the case in the matter of governance changes or faculty handbook revisions.¹⁹

The faculty status committee serves as a nominating committee for faculty vacancies on the other standing committees. Additional nominations may be made from the floor.

No information was given with respect to this committee's actual activities related to its function of counseling with the vice president for student services on matters and policies pertaining to faculty-student relations.

Curriculum and Academic Affairs Committee

The curriculum and academic affairs committee (CAAC) is an advisory body which recommends academic policies relating to curriculum, degree requirements, research, academic regulations regarding such matters as examination and grading policies, and other areas related to the educational processes within those programs of study approved by the board of trustees. Final decisions on the CAAC's recommendations rest with the board of trustees or, if so delegated by the board, with the president.

The CAAC is composed of seven faculty members, elected by the faculty, and six students appointed by the student senate.²⁰ Faculty committee members have one vote each, while student members have one-half vote apiece. The provost, registrar, and library director are ex officio nonvoting members. Faculty thus account for 70 percent of the committee's vote. Elected members serve for 3-year terms. Meetings are held at least monthly.

There are three categories of academic change, two of which (categories I and II) require action by the CAAC. Category I deals with academic changes affecting the total academic program; Category II deals with academic changes affecting the requirements for majors, minors, or associate degrees; and Category III includes all nonsubstantive academic changes such as changes in course titles, numbers, and descriptions.

The establishment or discontinuance of degree programs or of majors and minors are board of trustee matters. Proposals in these Category I areas may be presented to the CAAC by

its members; deans; any member of the faculty, staff or administration; and students. The CAAC examines the proposal and may invite persons to testify before it. If the CAAC agrees the proposal is acceptable it refers the proposal to the schools for their consideration and recommendations. After receiving decisions and recommendations from the schools, the CAAC either passes or denies the proposal. A proposal rejected by the CAAC on its second vote may not be resubmitted for 12 months. If passed, the proposal is submitted to a full faculty vote. If approved by the faculty, the proposal is submitted to the provost who approves or disapproves. If the proposal is denied by the provost, it is resumed to the CAAC along with reasons for the denial. The CMC then returns the proposal to the originator, along with the reasons for denial and suggestions for improvement. If the provost approves the proposal, he forwards it to the president with his recommendation it be presented to the board of trustees. Should the president disapprove, the proposal returns to the provost and thence to the CAAC which in turn returns the proposal to the originator.

Category I changes which affect distribution requirements, interschool degree programs, or substantive academic policy follow the procedures above outlined, except that the process ends with the provost. No specific examples of the faculty's having effectively recommended such matters were provided.

Category II changes are those involving changes in requirements of majors, minors, or associate degrees or involving "minor, relatively nonsubstantive academic policy alterations." This latter expression was not clarified. Proposals are submitted to the CAAC. After examination, the CAAC either passes or rejects the proposal. If rejected, the proposal is returned to the person introducing it, along with reasons for the denial. If passed by the CAAC, the proposal is forwarded to the provost who approves or disapproves. If disapproved, the proposal is returned to the CAAC with an explanation. Should the provost approve, the CAAC and concerned schools are notified. No information was provided regarding the effectiveness of CAAC recommendations in Category II matters.

The CAAC bylaws do not require that Category II proposals be submitted to a full faculty vote. However, the CAAC may choose to put certain Category II proposals to such a vote, and it appears this does occur, although no specific details of such instances were given.

Category III nonsubstantive changes are not reviewed or approved by the CAAC or submitted to a full faculty vote. Rather, pursuant to the CAAC bylaws, such changes are approved by the dean in consultation with the appropriate school members and submitted to the provost for approval.

With respect to the effectiveness of faculty recommendations on curriculum, Cooper broadly testified that since his arrival at UGF, all such recommendations have been approved.²¹ As to the other academic matters which pass

¹⁹ Pursuant to art. X of the faculty handbook, the faculty may amend the handbook by a two-thirds vote of the faculty; amendments involving other than intrafaculty matters must be submitted by the president to the board of trustees for final approval.

²⁰ The committee's bylaws specify three student committee members, but witness testimony and an employer exhibit listing the committees and membership indicate there are six students as the committee currently is configured.

²¹ The exact testimony on this point is as follows:

Asked by Petitioners counsel whether Cooper would agree that faculty involvement in curriculum is limited to reviewing, advising, and making recommendations, Cooper concurred, adding that ". . . in my experience at the institution, there has never been a faculty recommendation [on curriculum] that has been rejected by any of the places along the way."

through the CAAC process, little information was provided regarding the effectiveness of faculty recommendations.

Cooper has raised with the CAAC concerns over certain low enrollment programs, as these represent financial losses for UGF. He has acceded to faculty desires to retain such programs. No information was given as to whether CAAC recommendations on this issue were accepted without independent evaluation by the provost.

Currently the CAAC is reviewing revisions of the core curriculum. Revision proposals have been formulated by the general education review committee, a faculty committee chaired by a nondean faculty member. Kottel testified that she recently asked the provost what would happen if a core were passed by the faculty that the provost did not like. According to Kottel, the provost replied that he would tell the board of trustees not to approve it, and the proposal would die. Kottel testified, "So the message was fairly clear, at least to me, that we could pass what we wanted to pass, but it may not get approved; we could pass something in the parameters of what is acceptable to the Administration, and it would get approved."

Cooper testified regarding this conversation as follows:

The conversation with Professor Kottel was really a part of a conversation at the Dean's Council meeting. . . . And what we were dealing with was a question of how the new core proposal would come to the faculty. . . .

I had outlined at the beginning of the conversation on that the fact that I was deeply concerned that we had spent two years working on a core proposal, and that the committee that was in charge of that, the General Education Review Committee . . . a faculty committee chaired by a faculty member who is not a Dean—that that body had given a proposal to the Curriculum and Academic Affairs Committee, and that the committee had in fact removed so much of one portion of it that I felt they were in danger of not fulfilling the Northwest Association's²² mandates for us to revise and upgrade our core curriculum activity. This was part of a general conversation that was going on with all of the Deans. Professor Kottel then asked me what would happen if the faculty were to vote either the shrunken proposal or to return to the original proposal, and I responded to her that I would have to recommend to the Board of Trustees that it not be passed or approved simply because I felt that it certainly did not meet the mandates of the Northwest Association, but I also added that I didn't feel that it measured up to the standards that the President was looking for in the quality and integrity of the education program at a University.

Another matter currently before the CAAC is a recommendation from a CAAC subcommittee that six credits of interdisciplinary classes be required.

A witness cited two instances in which Cooper took directly to the full faculty for a vote matters which should have been presented first to the CAAC. One involved the question of whether students sitting on the CAAC should continue to be accorded the right to vote on matters before that body. Despite Cooper's opinion that students should not have this

right, the faculty voted to retain student voting rights on the CAAC.

The other instance involved a change in curriculum requirements. What the curriculum requirements were, whether this was a matter of significant import, what the faculty's recommendation was, and whether that recommendation routinely was adopted by the administration were not given.

Admissions, Scholarships, and Financial Aid Committee

This committee carries out the policies and upholds the standards of UGF relating to admissions, scholarships, and financial aid as determined by the board of trustees. The registrar, director of financial aid, and vice president for student services are members by virtue of their offices. Also on the committee are three faculty members, elected by the faculty for 3-year terms, and two students. One of the faculty committee members is a dean. Each committee member has one vote.

The committee's functions, as specified in its bylaws, include formulating and implementing policies and procedures governing the admission and readmission of students and the awarding and withdrawal of scholarships and financial aid. With respect to scholarships, the committee administers moneys budgeted by the board of trustees by awarding scholarships and grants. The committee announces and conducts competitive applications and/or examinations and awards the scholarship moneys in accordance with its criteria. It also formulates criteria for the retention of scholarships. According to Cooper, with respect to matters involving scholarships, this is not merely an advisory body but rather is the decision-making body on campus.

With respect to financial aid, the committee assists the director of financial aid in the administration of Federal and other financial aid programs.

With respect to admissions, the committee reaffirms admission standards and registration policies. How this is done was not described. It may suggest modifications to such standards and policies, but the effectiveness of its suggestions was not given. The committee serves as an appeal committee for individual applications for admission and readmission.

Student Rights and Responsibilities Committee

This committee reviews matters of student concern and serves as the grievance body for students. Sitting on the committee are three faculty elected by the faculty, three students, and the vice president for student services. Each committee member has one vote.

The type of grievance typically heard by this committee involves disputes between professors and students regarding classroom conduct or academic grades. Professor Michael Low, a faculty member for 21 years, testified that in one 3-year period in the past, the committee heard only one case. As he is not now a member of this committee, he has no knowledge whether the number of cases heard by this committee has increased. as such cases are not publicized due to student privacy concerns.

Low testified regarding an instance 4 years ago when, following a decision of the committee, the committee was disbanded and reconstituted by the then-president. The case was reheard and an opposite conclusion reached. It appears, how-

²² The UGF accrediting association.

ever, that upon review of the first hearing on appeal, the then-president determined the adjudicative process had not followed the proper procedures, prompting him to reconstitute the committee for rehearing.

Graduate Council

The graduate council, an advisory body to the dean of graduate studies, is composed of seven graduate school faculty, appointed by the academic vice president on the recommendation of the dean of graduate studies; the graduate dean as chair; and the registrar, who serves ex officio. Besides the graduate dean, there are two deans on the committee. Members are appointed for indefinite terms. According to the faculty handbook, the council acts as the executive committee of the graduate faculty.

The council advises and recommends on graduate programs, curricula, and matriculation guidelines. The council makes recommendations to the dean of graduate studies regarding applicants for graduate studies. Inasmuch as the body is advisory to the graduate dean, who is himself a voting member of the committee, it is unclear whether the faculty committee members serve merely in an advisory resource capacity or whether their input actually constitutes effective recommendation. Definitive information pertaining to the effectiveness of this body's recommendations was not provided. No description of the actual deliberative and advisory processes of this body was given.

Teacher Education Committee

The teacher education committee is composed of five faculty appointed by the dean of the school of education; the registrar; the vice president of student services; and the dean of the school of education. The committee serves in an advisory capacity to the dean of the school of education.

The only description of the work of this committee was given by Cooper who explained it "deals with student teaching policies, generally oversees the text of the teacher education handbook, would make decisions regarding individual student participation in the teacher education certification program." No other information regarding this committee's procedures, recommendations, and/or decisions was provided.

Library Committee

On this committee are five faculty elected by the faculty, two students, and two staff members.²³ Each member has one vote. The committee is an advisory group to the library director with regard to library policies and acquisitions. No information was provided regarding specific matters recommended by the committee nor the effectiveness of its recommendations.

Strategic Planning Committee

This is a new committee chaired by the vice president for student services. There are five faculty, appointed by the president. All five are deans. There are an additional seven committee members: four staff personnel, two administrators, and one student. The committee is to recommend to the president on a 5-year plan dealing with the University's fu-

²³ The two staff members are the library director and the information resources director.

ture, including facility development, staff additions, and academic programs. Faculty are members on some of this body's subcommittees.

According to Kottel, faculty were not involved in long-term planning under past administrations. She explained that while Gilliard has changed that, it is too soon to know the extent to which faculty will be instrumental in such planning. Once formulated, the strategic plan will be submitted to the president, and then to the board of trustees.

Campus Master Plan Committee

Currently inactive, this committee was composed of two faculty appointed by the president, the auxiliary services director, the physical plant director, the library director, and three vice presidents, two of whom had one-half votes. The other committee members each had one vote. Of the two faculty, one was a dean.

The purpose of this committee was to project the long-range development of campus facilities and to make recommendations to the president. The committee completed a report which the provost characterized as a "driving force in the budgeting and planning for the institution."

Computer Planning and Policy Committee

This committee is composed of two faculty, neither of whom is a dean; four staff; and one student. It serves to recommend to the president campus policy and long-range plans for computer use on campus. No evidence was presented regarding the outcome of its recommendations.

Safety Committee

Committee members, appointed by the president, consist of two faculty, five staff, and the vice president of finance. The role of the committee is to assure campus facility safety and assist in implementing required safety procedures. No information was provided regarding its deliberative processes or the effectiveness of its recommendations.

Budget Committee

The budget committee develops the annual budget recommendation. The committee is composed of three faculty, three staff, four administrators, and one student. One of the three faculty members is appointed by the faculty status committee. This faculty member presents to the budget committee the faculty salary schedule drafted by the faculty status committee.²⁴ The other two faculty are the two undergraduate college deans who sit on the committee by virtue of their office. The staff and administrators are appointed by the president and the student member is appointed by the student senate. The budget committee meets on an as-needed basis.

With faculty input, deans develop specific program budgets for consideration by the budget committee. The faculty status committee makes specific recommendations with respect to faculty salaries. Other faculty groups may generate personnel requests for consideration by the budget committee. Tuition standards are established through the budget committee process and reviewed annually.

²⁴ Currently, the faculty status committee appointee to the budget committee is a dean.

According to Kottel, who has been a member of the committee for 8 years, the president gives the committee parameters within which to work. For example, the president may ask for a certain percentage of the budget to be in reserve, and a certain percentage per month to pay debt. The committee holds open hearings where any interested person may speak. The committee reviews the various requests of different campus constituencies and attempts to align them vis-a-vis the strategic plan of the university. The committee then presents its recommendations to the president. Kottel stated that in her 8 years on the committee, the president never has forwarded the budget to the board of trustees without first making changes to the committee's recommendations. She testified that while those changes at times have been minor, there have been occasions when presidents unilaterally have made major changes to the proposed budget.

Kottel presented examples in which she believed the budget committee's recommendations had been overridden. One involved a unanimous recommendation of the committee that surplus revenue be used to raise the pay of adjunct faculty. Although there was a surplus in the budget year, Gilliard refused to follow the committee's recommendation. Instead, the money was used for one-time expenses, based on the president's rationale that this was surplus money which could not be relied upon to continue in future years, and that therefore it should be used for one-time capital expenditures rather than for a budget item that would be continuing in nature, as pay raises would be.

Another instance involved the committee's allocation of \$20,000 to the continuing education budget to perform continuing education on campus. Thereafter, in mid-fiscal year, the administration unilaterally removed 75 percent of those funds from the continuing education budget without prior notification to the budget committee or to the dean overseeing the continuing education budget. The funds were reallocated by the administration in an attempt to balance funds. Vice President for Finance Washburn testified that the budget committee is responsible only for developing and recommending an annual budget and plays no role in monitoring the budget once passed. He explained that this particular instance was caused by the institution's need to reapportion allocations.

Kottel stated that besides making changes to the committee's recommended budgets, the administration imposes its will on the committee by specifying in advance what will or will not be acceptable. She gave as an example the committee's wish to use a certain amount of endowment money to effect needed repairs on the campus infrastructure. Gilliard felt this amount was too high and instructed the committee to write in a lesser figure. However, Washburn, who also sits on the budget committee, testified that despite Gilliard's opposition, the committee's original recommendation regarding the amount of endowment money to be used for the infrastructure remained in the budget and was adopted by the board of trustees.

As another example, Kottel testified the president often informs the committee of a specific upper limit for tuition increases.

Beautification Committee

One faculty member, three staff persons and one student comprise the beautification committee. All are appointed by

the president for the purpose of making recommendations regarding the esthetics of the campus' physical plant. No other information regarding this committee was provided.

Grievance Committee

As noted above, grievance committees are appointed on a case-by-case basis to hear faculty grievances in matters other than those handled by the faculty status committee. Committee members are appointed by the president. Of five members, one is a faculty member. Cooper testified that grievants usually accept the committee's decisions, although they may appeal to the president whose determination is final.

Academic and Faculty Affairs Committee

This is a standing subcommittee of the board of trustees composed of nine members, one of whom is faculty.²⁵ The faculty member is elected by the board of trustees. In addition, there are four trustees, two students, one administrator, and the Great Falls school superintendent. All committee members have one vote. This committee makes recommendations to the full board regarding academic policies and programs; faculty status committee recommendations vis-a-vis faculty tenure, promotions, sabbaticals, and leaves; and students recommended for graduation. The committee meets three times yearly.

Student Services Committee

Another subcommittee of the board of trustees, the student services committee is composed of one faculty, two staff, one administrator, four students, and four trustees, all having one vote. The faculty member is appointed by the faculty status committee. The current faculty member is not a dean. This committee makes recommendations on student services policies directly to the board of trustees. It meets three times yearly.

Faculty Meetings

No information was provided regarding the frequency of facultywide meetings and/or facultywide votes. Nor was evidence provided describing faculty meeting procedures or the matters there discussed. It appears the provost chairs these meetings. According to Kottel, the majority of recommendations which emanate from the various committees are not submitted to facultywide votes.

Hiring

The UGF president ultimately decides who will be hired as well as the number of positions which will be filled. Faculty members are hired through a search committee process. The provost selects a dean to serve as chair of the search committee. The dean selects the other committee members, to include a faculty member from the school having the vacancy, a faculty member not of that school, and a student majoring in the school with the vacancy. In some cases, additional persons may be appointed to the committee.²⁶ The

²⁵ The faculty status committee has the option, not currently exercised, to appoint an additional faculty member to this subcommittee.

²⁶ Such was the case for the search committee constituted in the fall of 1995 for a faculty vacancy in physical education. Besides the

search committee screens applications and recommends the top three candidates for on-campus interviews. Candidates brought to the campus are interviewed by the search committee and the provost. In addition, candidates meet with the president, graduate dean, and other interested faculty, students, administrators, and staff persons.

A final search committee recommendation is submitted to the provost. Cooper described his role as being "independent from the search committee" and his responsibility as "to judge both the candidates and how I perceive they will impact the institution, just as significantly as the search committee." He explained that "in the vast majority of cases, I will be in concurrence with the committee. It would be the exception to the rule that I would object to it." He stated that in instances where he himself is not "a hundred percent sure," he follows the committee's recommendation. He adheres to the philosophy that both the search committee and he must be satisfied the candidate recommended will be a strong contributor to the institution.

Cooper testified that in his 2 years at UGF, there have been nine faculty searches, of which he has declined to follow the search committee's recommendation in one instance. In that case, the provost hired a candidate who was one of the lower-ranked by the search committee.

In another of these nine searches, Cooper approved the committee's choice, although it was not his own first choice, after discussing the matter with the dean serving as search chair. In another instance, although one of the applicants who held a Ph.D. degree met all the criteria as far as credentials and background, the search committee felt the candidate would not be willing to spend enough time with students. Although UGF wished to upgrade the staff by retaining someone with a Ph.D. in the area, Cooper accepted the committee's reservations regarding this applicant and a person with a lesser degree was retained.

Faculty may sit on search committees for administrative personnel. With respect to the selection of the president, the faculty handbook specifies "[j]oint effort of a most critical kind must be taken when an institution chooses a new president. The selection of a chief administrative officer should follow upon cooperative search by the Board of Trustees and the faculty." It appears that faculty were members of the search committee for the presidential vacancy filled by Gilliard. However, the exact proportion of faculty on that committee was not given, nor the number of those faculty who were deans/division heads. Nor was information provided regarding whether the recommendation of that panel was accepted.

As far as the selection of the provost/academic vice president, applications are submitted to a faculty screening committee composed of seven members: two members of the faculty status committee selected by that committee; two members of the CAAC selected by that committee; two members of the general faculty elected by that body; and one dean selected by the other deans. The screening committee which reviewed candidates for the provost vacancy filled by Cooper had as members students and staff persons as well. Cooper believed 7 of 11 members of his search committee were faculty; the number who were deans/division heads was not

dean, as chair, two faculty members, and a student, there were an administrator and a staff person from student services.

given. The provost search committee's recommendation is submitted to the president. According to the faculty handbook, "[t]he president will entertain the suggestions [of the search committee] but reserves the right both to review other candidates not on the faculty committee list and ultimately to choose one of the latter." In the case of the vacancy filled by Cooper, the president interviewed all candidates. Cooper was the search committee's recommended applicant.

Last year, faculty sat on the search committee for a non-faculty student services position. The proportion of faculty to nonfaculty was not provided. The committee ranked four candidates, unanimously agreeing the fourth-ranked candidate was not appropriate for the position. The vice president of student services declined to follow the committee's recommendation and in fact hired its fourth-ranked candidate.

New Faculty Structure

The recent reorganization of the institution into colleges and schools headed by deans was approved as a pilot project by a vote of the faculty. According to Cooper, there was "immense" faculty involvement in the development of the new organizational design, but the exact nature of this involvement was not described.

Teaching Loads

Prior to 1992, faculty could meet the requirements of their faculty contracts by teaching from 24 to 26 credits per academic year. In 1992, the faculty status committee recommended to the board of trustees that this spread in teaching loads be modified such that the required teaching load be standardized at 24 credits. This recommendation was accepted and implemented by the board. Any individual reduction in a particular faculty member's teaching load from the standard must be recommended to the provost by the faculty member and the school dean. The provost unilaterally developed a policy whereby faculty may not teach in excess of the standard teaching load, even should particular faculty wish to teach extra classes. The provost has charged the deans with ensuring this policy is followed.

While the faculty handbook permits a portion of a faculty member's teaching load to be transferred to the summer session, Cooper, over the objections of two faculty status committee members, supported a faculty members desire to transfer her full load to the summer session. Cooper's comment in defense of his position was that the faculty handbook is a "stale" guide. It is unclear whether the faculty status committee as a body officially objected and whether the transfer was effected.

Admissions Policies

As UGF is an open admissions institution there is thus no faculty involvement, as a historical matter, in establishing or changing general admissions policies.

Specific programs at the graduate level may have certain admissions standards established through the graduate council process. Whether this in fact occurs and, if so, whether nondean faculty committee members effectively recommend such standards were not given. Elevated standards for participation in student teaching are established through the teacher education committee process, though no description of this process was given.

Teaching Methods

Faculty establish their own teaching methods.

Size of Student Body and Class Size

As UGF is an open enrollment institution, faculty have no input into enrollment levels. Faculty do not participate in determining the number of students who will be accepted in a major.

With respect to class size, the school dean and individual faculty member together recommend to the CAAC. Kottel testified that the institution "has followed a practice of acceding to faculty interests in terms of identified pedagogical needs for class size." However, an instance was given in which a former provost unilaterally raised the class size of an English class despite faculty protest.

Course Scheduling

School deans work with individual faculty and the registrar in developing course schedules as above described.

Student Absences

Faculty individually and unilaterally determine class policies governing student absence.

Academic Calendar

The academic calendar is reviewed by the CAAC and put to a vote of the faculty. In Cooper's experience at UGF, there have been no calendar alterations other than those proposed by faculty.

Grades and Grading Policies

The UGF grading system is set forth in its catalog. Changes in the system go through the CAAC process and must be approved by the provost and president.²⁷ It is unclear whether CAAC recommendations regarding grading policies generally and routinely are approved. Individual faculty independently determine the application of the grading system to their students, subject to an appeal process.

Faculty have individual discretion in determining their policies vis-a-vis student cheating, but are required to notify classes through their syllabi should their policies be harsher than the standard set forth in the student rights and responsibilities handbook.

Changes to a student's grade outside a certain timeframe require approval of the provost.

Matriculation Standards; Graduation and Degree Standards and Requirements

Individual faculty determine whether transferring students' courses qualify for credit toward their work at UGF. It is the faculty member with the professional expertise in the subject area of the courses under consideration who makes this eval-

²⁷ Although Kottel testified that there recently have been new grades promulgated without faculty input, further testimony established that the designations to which she referred are not grades of academic performance but rather shorthand designations of reasons for which grades are not being reported at that time. Specifically, IP designates in progress coursework or research; NG, no grade; and RD, grade report delayed.

uation. In reaching a decision on such matters, faculty rely on UGF standards required in the major, which standards are approved by the full faculty through its vote on curriculum design.

Many of the issues pertaining to graduation and degree requirements and standards pass through the CAAC process. Depending upon the category within which the rules fall, the CAAC's recommendation may go directly to the provost or may be passed to the full faculty for a vote prior to being transmitted to the provost, president, and board of trustees. As noted, it is the deans who approve applicants for graduation.

Through the CAAC process, faculty advise as to requirements for the core curriculum and majors. Faculty unilaterally cannot make changes to the standards and requirements approved by the administration.

Kottel testified that Rules regarding whether Telecom home study classes count for residency credit, the number of independent studies a student may take, and the number of Telecom home studies classes a student may take unilaterally were set by the administration.

Tuition

Tuition is recommended to the board of trustees by the budget committee.

Retention, Suspension, Probation, and Expulsion of Students

Nondean faculty members do not participate in decisions involving student retention, suspension, probation, or expulsion.

Course Substitutions and Petitions for Special Consideration

Students' requests for course substitutions and petitions for special consideration are recommended to school deans by students' academic advisors. Only faculty serve as advisors. There have been many instances in which academic advisors' approvals of course substitutions and petitions for special consideration have been overruled by deans.

Course Content/Course Offerings/Credit Hours

Establishing course content historically has been within the realm of faculty. Faculty members' course offerings are subject to final approval by the provost. The number of credit hours assigned courses is dictated by standards promulgated by the Northwest Accreditation Association.

New Facilities/Space Allocation

The president is guided in the establishment of new facilities and in the allocation of space on the broad scale by the campus master plan approved by the board of trustees.

School deans and individual faculty may make requests to the administration with respect to smaller-issue space allocation matters, such as requests for conference rooms or advising areas, or for adding accouterments to a classroom. The administration attempts to accommodate such requests where possible.

Analysis and Conclusions

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court found that faculty members at that institution were managerial employees excluded from the Act's coverage. The Court defined managerial employees as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer."²⁸ It held that managerial employees "must exercise discretion within, or even independently of, established employer policy and must be aligned with management,"²⁹ and that they must represent "management interests by taking or recommending discretionary actions that effectively control or implement employer policy."³⁰

The Court found that through facultywide meetings and participation on faculty committees, the faculty at each of the Yeshiva University schools effectively determined curriculum, grading systems, admissions, matriculation standards, academic calendars, and course schedules. In addition, faculty at some schools made decisions regarding admission, expulsion, and graduation of individual students, and others had made decisions involving teaching loads, student absence policies, tuition, enrollment levels and, in one case, the location of a school. In nonacademic areas, the Court found that the faculty made recommendations regarding hiring, tenure, sabbaticals, terminations, and promotions, the majority of which had been implemented. Relying primarily on faculty's extensive authority over academic affairs, but noting also its predominant authority in nonacademic areas, the Court approved the Second Circuit's conclusion that the faculty members were "in effect, substantially and pervasively operating the enterprise." The Court concluded:

Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school.

The Yeshiva faculty were found to be managerial despite occasional vetoes of faculty action caused by "administrative concerns with scarce Resources and University-wide balance."³¹ In *Lewis & Clark College*, 300 NLRB 155, 162 (1990), the Board, considering this language in *Yeshiva*, concluded that there are "college policy questions (i.e., 'financial resources,' 'general institutional goals,' or 'University-

²⁸ 444 U.S. at 682, quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

²⁹ *Id.* at 683.

³⁰ *Ibid.*

³¹ *Id.* at 688 fn. 27. See *American International College*, 282 NLRB 189, 202 (1986) (vetoes of faculty proposals did not preclude finding faculty members to be managerial employees, as incidents were not substantial or predominant, and did not show a pattern of unilateral action that undermined faculty authority); *Boston University*, 281 NLRB 798 (1986), *enfd.* 835 F.2d 399 (1st Cir 1987) (that administration occasionally made and implemented policy decisions without faculty input did not detract from the faculty's managerial authority).

wide balance') that are broader than academic policy matters and from which the faculty members may be excluded yet they remain managerial employees."

In *Yeshiva*, the Court held that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research.

Since *Yeshiva*, the Board has held that it is faculty member's participation in the formulation of academic policy that aligns their interest with that of management.³² Faculty authority in nonacademic matters is accorded less weight in determining whether faculty are managerial employees.³³ In cases where there is substantial indicia of faculty's managerial status in academic areas, an administration's frequent rejection of faculty recommendations in nonacademic areas, such as faculty promotion and tenure, would not preclude a managerial finding. *University of Dubuque*, 289 NLRB 349 (1988). Nor does effective recommendation in such nonacademic matters as tenure or promotion require a managerial conclusion. *Loretto Heights College*, 264 NLRB 1107 (1982), *enfd.* 742 F.2d 1245 (10th Cir. 1984). It is not faculty's authority on paper which determines their status, but rather their authority in practice. *Bradford College*, 261 NLRB 565 (1982); *St. Thomas University*, 298 NLRB 280 (1990).

In *Thiel College*, 261 NLRB 580, 586 at fn. 34 (1982), the Board held that faculty involvement or lack thereof in the following areas is not vitally significant in determining faculty's managerial status: academic calendars, student absence policies, enrollment levels, tuition, and the location of a school.

Under *Yeshiva*, a faculty need only exercise effective recommendation or control, rather than final authority, to be deemed managerial. In *Lewis & Clark College*, *supra*, the Board emphasized that "neither the Board nor the Court requires that a faculty possess absolute or plenary authority in order to be found to be managerial; the standard set forth in the Court's decision is 'effective recommendation or control.'" (300 NLRB 163 at fn. 41). Effective recommendation authority is found where nearly all recommendations are routinely approved by the administrative hierarchy, without independent review. *Lewis & Clark*, *id.*

The party seeking to exclude either a whole class of employees or particular individuals as managerial has the burden of presenting the evidence necessary to establish such exclusion. *Montefiore Hospital & Medical Center*, 261 NLRB 569 (1982) at fn. 17.

In *Livingstone*, *supra*, the Board concluded that faculty were managerial employees based on its finding that the faculty exercised "almost plenary control over curriculum and academic policy." The Board found significant the fact that all curriculum changes had to be approved by the faculty-dominated curriculum catalog committee and that the administration could not make changes in academic policy without

³² *University of Dubuque*, 289 NLRB 349 (1988); *Livingstone*, *supra*. In *Lewis & Clark*, *supra*, faculty were found managerial because nearly all their recommendations on academic matters were routinely approved. While some faculty recommendations were independently reviewed, this did not negate a managerial finding as such review occurred predominantly with nonacademic rather than academic matters.

³³ *Lewis & Clark*, *supra* at 161 fn. 30 and cases cited therein.

presenting the changes to this committee. The Board noted that in certain academic areas,³⁴ the majority of the recommendations made by various committees and approved by the faculty were implemented without prior approval from the administration and that there was no evidence the administration ever had countermanded these faculty decisions. The Board placed only limited significance on the fact that the faculty lacked authority in nonacademic matters such as the budget process, tenure decisions, selection of administrators, and no authority in the hiring and firing of faculty.

In *University of Dubuque*, supra, the Board found faculty to be managerial employees based on their substantial role in curriculum and academic policy decisions, their minority involvement on combined committees, and on an extant collective-bargaining agreement which gave “the faculty . . . the exclusive right to set student grading and classroom conduct standards; set degree requirements; recommend earned degree recipients; initially receive and consider new degree programs; and develop, recommend, and ultimately approve curricular content and course offerings.”³⁵ In addition, while noting that it was of less significance, the Board found that faculty’s minority involvement on certain other committees allowed them effectively to recommend discretionary actions with respect to a number of nonacademic areas of governance, including department staffing, budgeting, long-term planning, and personnel actions pertaining to faculty members such as hiring, promotion, and tenure decisions.

In *Boston University*, supra, faculty were found to be managerial employees because they exercised effective control over matriculation requirements, curriculum, academic calendars, and course schedules and had absolute authority over grading, teaching methods, graduation requirements, and student discipline. The Board also noted the faculty played an effective role in recommending faculty hiring, tenure, promotions, and reappointments.

Likewise, in *American International College*, supra, the Board found faculty to be managerial because the faculty effectively controlled academic standards and curriculum through their participation in committees and through their vote on recommendations and proposals made by the committees. The faculty’s influence in hiring, promotion, and tenure decisions also was noted.

In *Loretto Heights*, supra, faculty participated in the governance of the college through various faculty-dominated committees. The administration routinely accepted the recommendations of these committees in the areas of academic policy, new courses, grading criteria, faculty promotion, and tenure. However, in spite of the faculty’s power, the Board found faculty members to be nonmanagerial. In making that determination, the Board relied in part on the fact that most of the actions taken in which faculty members participated were in the form of recommendations and advice, and that no faculty member was authorized to take any action on the member’s own initiative that would be final and binding on the college. The Board also relied on the presence of a large administrative staff. The Board found that such a staff created an effective buffer between the top management and the

lowest echelon, eliminating the need for the institution’s administration to rely on the faculty for advice, recommendations, and the establishment and implementation of policies. It was the program directors who provided the buffer in that case. These individuals largely controlled the budget, served on key committees and task forces, and were administrators rather than instructors even though they carried teaching loads. In enforcing the Board’s decision, the court relied upon the infrequent or insignificant nature of committee work, the mixed membership of many committees, the faculty’s limited decision-making authority, and the layers of administrative approval required for many decisions.

Turning in the instant case to the status of the UGF deans, I find that deans take or recommend discretionary actions in both academic and nonacademic areas which effectively control or implement UGF policies and thus are managerial employees, as both parties urge.

Deans are responsible for overseeing all facets of their schools. One way in which they accomplish this is through their administration of their schools’ budgets, for which responsibility they are held accountable and on which they are evaluated by the provost.³⁶ Deans are significantly involved in course scheduling. They may determine additional classes should be taught, make arrangements for faculty to teach them, and reschedule class times as they deem appropriate. Deans independently may cancel classes based on such considerations as enrollment levels, even over faculty objections. Deans determine whether adjunct faculty will be hired for specific classes, and which adjunct faculty to hire. Deans approve students for graduation.

A variety of actions cannot occur absent deans’ approval. For example, deans must authorize faculty travel; school work orders; changes in course schedules after the schedules have been printed; purchase orders, including textbook orders; student applications for individualized study and summer session courses; student course challenges; and waivers of courses. Deans have denied textbook requisitions submitted by faculty. A faculty member’s request for sabbatical will not be granted absent the dean’s approval.

Deans are the first step in the resolution of student grievances and have authority, which is exercised, to resolve those grievances. They also hear and adjust student complaints regarding faculty which are not brought as formal grievances.

Deans have other authority and duties which have both managerial and supervisory aspects. For example, deans perform annual performance evaluations of the faculty of their schools, which are based in part upon deans’ observations of

³⁴ Those areas were curriculum, degree requirements, course content and selection, graduation requirements, matriculation standards, and scholarship recipients.

³⁵ Id. at 350.

³⁶ A review of the provost’s performance evaluations for three of the deans supports a conclusion that deans perform a large number of significant duties pertaining to the running of the institution which are in addition to those typically expected of a professor in the discharge of his professional responsibilities as a teacher. I note, moreover, that in Cooper’s evaluation of the dean of the school of education, he specifically commends her for her “academic management” and for creating and launching, in cooperation with the graduate studies dean, a new Master of Arts in Teaching degree without the hiring of additional staff. The dean of the school of business is lauded for her modification of the accounting curriculum, creation of the cooperative B.S. in respiratory therapy program, and resolution of “a very difficult 1994 Fall Semester staffing problem.” He urges her to “[k]eep up the good work in monitoring the Business School budget and in exercising control over part-time and overload staffing expenditures.”

faculty members' teaching abilities. These evaluations become part of faculty members' personnel records and are used in deciding promotion and tenure. Deans independently discipline faculty, both orally and in writing. Written reprimands become part of faculty members' personnel files. Deans have effectively recommended faculty terminations. They effectively recommend the hiring and retention of specific adjunct faculty.

Based on the foregoing and the record evidence as a whole, I conclude that deans are aligned with management and I find they are managerial employees.³⁷

The managerial status of nondean program directors and the computer laboratory manager is less clear. They are expected to ensure the tasks of their programs are carried out, but their specific duties and responsibilities vis-a-vis this goal were not described. While there was testimony to the effect that program directors have authority to discipline faculty who report to them comparable to the disciplinary authority of deans, no example was provided in which a nondean director independently disciplined a faculty member or effectively recommended such action. Moreover, only four of the nondean program directors have faculty reporting to them.

Based on the record before me, I am unable to conclude that nondean program directors are managers by virtue solely of their duties and responsibilities as program directors.

Turning now to the managerial status of nondean faculty, I note that faculty comprise a voting majority on only the CAAC, faculty status committee, graduate council, teacher education committee, and library committee. Of these committees, faculty are elected to committee membership by the faculty at large only on the CAAC and the faculty status and library committees. On the graduate council and teacher education committee, faculty are appointed by deans.³⁸

While there are several committees on which faculty comprise a minority, it is with the influence of these faculty-dominated committees that I am primarily concerned in resolving the issue of faculty's managerial status. Decisions or recommendations made by committees only a minority of whose members consist of faculty representatives cannot be said to be faculty decisions or recommendations.³⁹ In light

³⁷As noted by the Supreme Court in *Yeshiva*, an individual's role in decisions pertaining to faculty hiring, tenure, sabbaticals, termination, and promotion has both managerial and supervisory characteristics. *Yeshiva*, supra at 686 fn. 23. As no party has asserted a position that deans are supervisors, I make no finding as to deans' supervisory status.

³⁸In *Cooper Union*, supra at 1774, discussing *College of Osteopathic Medicine & Surgery*, 265 NLRB 295 (1982), wherein faculty were found managers, the Board noted as significant the fact that voting members of many committees were elected by the faculty.

³⁹The Tenth Circuit, in *Loretto Heights College*, 742 F.2d 1245, 1253 (10th Cir. 1984), enfg. 264 NLRB 1107 (1982), held that effective control of academic policies cannot be imputed to faculty when faculty comprises a minority of the committee which develops and reviews these policies. However, in *University of Dubuque*, supra, the Board, in concluding faculty were managers, relied in part on faculty minority membership on committees. In that case, though, faculty were vested with the exclusive right to set student grading and classroom conduct standards; to set degree requirements; to recommend earned degree recipients; initially to receive and consider new degree programs; and to develop, recommend and ultimately approve curricular content and course offerings. Despite its partial reli-

of this rationale, and given that, in any event, the evidence is insufficient to warrant a conclusion that effective recommendations in key academic areas emanate from UGF committees on which faculty are a minority, I shall not rely upon the roles of these committees in reaching a determination on managerial status.

No party contends that the committees on which faculty constitute a majority are other than advisory in nature, having the authority only to recommend. The controlling issue, then, is whether these committees "effectively" recommend policy or action. With respect to the library committee, graduate council, and teacher education committee, the record evidence is insufficient to support a conclusion that nondean faculty members on these committees effectively recommend or otherwise exercise managerial authority. Thus, while the record is replete with evidence that these committees make recommendations in critical academic areas, the record is vague or silent as to whether such recommendations generally and routinely are approved by the administration or whether those recommendations are independently reviewed and evaluated by higher administrators.⁴⁰

In the key area of academic policy and rules, the CAAC is the committee which recommends such matters as degree requirements, matriculation and graduation standards, curriculum, and examination and grading policies. These matters lie at the very heart of the business of the institution.

Seventy percent of the committee's vote is held by faculty.⁴¹ While Cooper generally testified that in his 2 years at UGF all faculty recommendations regarding curriculum have been approved, information was lacking as to the nature and number of such recommendations; which, if any, of these were recommendations of the full faculty versus of the CAAC only; and to what extent, if at all, higher administrators independently reviewed and evaluated such rec-

ance in *Dubuque* on faculty minority membership on committees, in other cases the Board has followed a rationale vis-a-vis faculty representation on committees similar to that expressed by the Tenth Circuit in *Loretto Heights*. Thus, for example, in *Cooper Union*, supra, the Board at fn. 21 noted that in finding the faculty of *College of Osteopathic Medicine* to be managerial, it had relied on "100 percent faculty composition of key committees and faculty initiation of a major change in the entire academic curriculum as indicative of faculty authority." In finding the Cooper Union faculty nonmanagerial, the Board relied in part on the fact that faculty constituted a minority on most governance committees and something less than a voting majority on about one-half of the committees; only one of 14 faculty committees was 100-percent faculty in composition. In *Lewis University*, 265 NLRB 1239 (1982), the Board noted that although the communications advisory board's recommendations generally were adopted, "it is apparent that, because only one member [of six or eight committee members] is a faculty member, this member could not effectively formulate and effectuate the Employer's policies." See also *Lewis & Clark*, supra at fn. 37.

⁴⁰As noted, on the graduate council and teacher education committee, it is unclear to what extent the deans to whom these committees are advisory and who themselves sit and vote on the committees guide or control the formulation of the committee's recommendations.

⁴¹To the extent deans may hold faculty seats on this and other committees by virtue of their election to the committees by the faculty at large, I will not consider their presence on the committees as a diminishment of faculty authority, despite their managerial role, as they have been elected freely by nondean faculty to represent faculty's interests.

ommendations.⁴² Thus, Cooper's general assertion that since his arrival at UGF, all "curriculum" matters passed by the faculty have been approved at every step is too vague to permit a meaningful assessment of the actual activities of the faculty as a whole and/or of the CAAC in this regard. I note, moreover, that while curriculum is a key academic matter, in no case have faculty been held managerial solely because of their participation in recommending curricular matters. In fact, in *Loretto Heights*, supra, faculty were found not to be managers even though faculty approval was required for major curricular changes, such as the introduction of new majors, minors, and degrees.

As to key academic matters other than curriculum; the CAAC and full faculty clearly provide input.⁴³ However, the Employer failed to establish that faculty recommendations on such matters, either directly from the CAAC or from the faculty as a whole, constitute effective recommendations. Moreover, there is evidence that the UGF administration, without faculty input, unilaterally has established certain academic rules such as the number of independent studies and Telecom home studies classes students may take and whether Telecom home study classes may be counted for residency credit. There have been instances, also, in which Cooper bypassed the CAAC to take directly to the full faculty matters which properly should have been presented first to the committee, in disregard of the procedures specified in the faculty handbook.

As to academic matters not passed through the committee structure, I note that it is deans, not nondean faculty, who determine course schedules, approve students for graduation, and approve student requests for course substitutions, petitions for special consideration, applications for individualized study, and summer session courses. Nor do nondean faculty participate in decisions regarding the retention, suspension, probation or expulsion of students.

Based on the paucity of evidence regarding the frequency of facultywide votes, the specific matters thereby considered, and the effectiveness of the resultant faculty recommendations, I am unable to conclude that faculty as a whole are managers by virtue of their participation in facultywide deliberations.

That faculty and deans together effectively recommend class size, and that faculty individually decide student grades within the parameters of the UGF grading system, determine class absence and cheating policies, and establish course content and teaching methods used in their own classes does not compel a managerial finding, as faculty are not to be excluded as managers based on decisions relating solely to their

⁴² The exchange between Kottel and Cooper over the core curriculum revisions would tend to indicate that higher administrators review and evaluate faculty recommendations on curricular matters against the administration's own opinions and standards and base their approval or disapproval on the degree to which faculty's recommendations are in harmony with the administration's views. While I would not make a finding that faculty curricular recommendations are not effective based solely on the exchange between Kottel and Cooper, without further detailed testimony on specific curricular recommendations, I conversely am unable to determine whether faculty recommendations in this area in fact are effective.

⁴³ It is unclear whether faculty as a whole generally vote on category II changes.

own classes and students. *Yeshiva*, supra. That individual faculty are called upon to decide questions of accreditation of transfer courses within their area of professional expertise likewise does not require a managerial finding. That faculty approve the academic calendar is not dispositive of the issue. *Thiel*, supra at fn. 34.

Although the board of trustees adopted a faculty status committee recommendation that the teaching load required to fulfill faculty's contractual obligations be modified from a range of 24 to 26 credits to a single standard of 24 credits, that recommendation was made in 1992 and was more in the nature of achieving uniformity among faculty. It is unknown how many faculty actually carried loads in excess of 24 credits prior to the change. Since that time, Cooper unilaterally implemented a policy prohibiting faculty from teaching in excess of 24 credits, even if individual faculty members wish to do so. Moreover, there was no evidence that nondean faculty assign teaching loads, assign classes, balance class size, or coordinate work among faculty of a school.

While faculty voted its approval of the recent UGF reorganization into colleges and schools headed by deans, it is unclear whether that vote was determinative in effectuating the change. Although Cooper testified there was "immense" faculty involvement in the development of the new organizational design, the exact nature and weight of that involvement were not given. It therefore cannot be concluded, on this record, that faculty determined or effectively recommended the new faculty structure.

While there is evidence that faculty status committee recommendations often are followed, these recommendations are in nonacademic areas, to which the Board accords less weight in determining whether faculty members are managerial employees. Moreover, many of the recommendations of this committee are not routinely accepted but rather are independently reviewed and evaluated, particularly by the provost, as they travel up the administrative hierarchy. Where the provost strongly has opposed a faculty status committee recommendation, higher administrators have approved the provost's recommendation over that of the committee. Additionally, the provost has taken such action as terminating nonadjunct faculty without consulting with this committee, in apparent disregard of the established procedures. Sabbatical requests not first approved by the dean will not be granted.

While the faculty status committee may and does establish subcommittees to develop proposals in a number of important areas, such as revisions to the faculty handbook and governance, no evidence was provided demonstrating that recommendations emanating from these subcommittees and accepted by the faculty status committee constitute effective recommendations.

With respect to hiring, nondean faculty sit on search committees for faculty positions, although they do not constitute a majority on such committees. Moreover, Cooper interviews and evaluates finalists as well. Cooper described his role as being independent of the search committee and equally significant in terms of judging the candidates. As nondean faculty do not constitute a majority on the search committees and as Cooper clearly does not accept the recommendations of these committees without independent review and evaluation, I cannot conclude that nondean faculty effectively recommend faculty hiring.

There is no question that faculty play a role in the selection of the president and academic vice president/provost. However, the record did not specify the number of nondean faculty on the most recent search committees for these positions and so it cannot be determined whether their voice was determinative in reaching a recommendation. Moreover, the record did not establish whether the presidential search committee recommended Gilliard, the person hired for the position. While the search committee for the provost/academic vice president position did recommend Cooper's hire, the president accepted that recommendation only after independently interviewing candidates for the position.

While faculty sat on the search committee for a nonfaculty student services position, the proportion of faculty was not given. Moreover, in that case, the vice president of student services rejected the search committee's recommendation and hired the one applicant who the search committee unanimously agreed was not suitable for the position.

While faculty clearly participate in the hiring process, it cannot be concluded, based on this record, that nondean faculty effectively recommend hiring. Nor does the record evidence support a conclusion that nondean faculty determine or effectively recommend budget, salaries, or tuition.

I note that deans, whom I have found to be managers, teach courses in particular disciplines and possess the "professional expertise" indispensable to the formulation and implementation of academic policies. The provost also holds faculty rank, and while he does not teach, he clearly is relied upon by higher administration for his expertise in academic matters. There is thus a group apart from nondean faculty who possess the requisite professional expertise in academic areas and upon whom the administration may, and does, rely in formulating and implementing policy.

Even though faculty members, either through committees or as a whole, are empowered to make recommendations in many areas, the evidence is insufficient to warrant a conclu-

sion that these recommendations effectively control or implement employer policy to an extent that would require excluding nondean faculty from coverage under the Act as managerial employees.⁴⁴ I cannot conclude, on the record before me, that faculty as a whole, or even those faculty who sit on committees, are aligned with management as contemplated under *Yeshiva*.

Accordingly, as the Employer has failed to meet its burden of demonstrating that nondean faculty exercise managerial authority as contemplated under *Yeshiva* and subsequent Board cases, I find that nondean faculty are not managers.

With respect to nondean program directors, including the computer laboratory manager, the record evidence is too vague and ambiguous to support a conclusion that they are managers by virtue solely of their responsibilities as program directors. As there has been no showing that nondean program directors otherwise should be treated differently from nondean faculty whom I have found nonmanagerial, I shall include nondean program directors and the computer laboratory manager in the unit.

As I have found deans to be managerial employees, it would be inappropriate to grant the Employer's request that they be included in the unit of nondean faculty. Accordingly, I shall exclude deans from the unit.

There are approximately 41 employees in the unit.

⁴⁴The Employer would point to the recent interim evaluation report done on UGF by the Northwest Association of School and Colleges, UGF's accrediting agency, as support for its assertion that faculty's role in curriculum and governance matters is managerial. However, I note that the comments contained in that report are far too general to constitute proof of the matter before me. Thus, for example, the comment that core curriculum proposals by various faculty members are being studied is not dispositive of the faculty's role in formulating or recommending that curriculum. Nor is the report's language regarding faculty in governance any more helpful in analyzing the faculty's role under the Board's standards.